IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 26 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEMA CHEMICAL CO.

Versus

RATNALBH CHEMICALS PVT.LTD.

Appearance:

NANAVATI & NANAVATI for Petitioner

MR AKSHAY H MEHTA for Respondent no.1

MR PJ KANABAR for Respondent no.1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 14/06/2000

ORAL JUDGEMENT

1. The petitioner M/s. Hema Chemical Pvt.Ltd. has filed this petition under Section 433 and 434 of the Companies Act (hereinafter referred as to as "Act"), against M/s. Ratnalabh Chemicals Pvt. Ltd. having its registered office at Baroda. The main ground for filing this petition is that the amount of Rs. 5,26,207/(Rupees

Five lacs Twenty thousand Two hundred and Seven only) was due and payable by the company to the petitioner and company failed and neglected to make payment. It was alleged that the petitioner also addressed a statutory notice dated 12th May, 1997 calling upon the company to pay the amount, which was duly received by the company. The respondent company replied the said notice on 5th July,1997 in which it was stated that against the payment, the company has to supply some other chemicals against the payment and not the actual payment. It appears that one of the defence was that the statutory notice was not properly signed. In view of the same, company addressed another statutory notice dated 25th July, 1997 on the same ground and ultimately, on 28th August, 1997 the reply was filed by the company.

2. In view of the aforesaid circumstances, the present petition under Section 433 and 434 of the Companies Act was filed on 5th March, 2000 and the company replied the same on 27th July, 1998 in this behalf, raising the identical defence in the said reply. This Court (Coram : H.L.Gokhle,J) by his order dtd. 21st December,1998 held that the unit of the respondent company is not functioning since October, 1999 in view of the closure notice served by the Pollution Control Board. It was also stated that Pollution Control Board has passed the order on 8th October, 1998 in this behalf. It was stated that company was not viable unit and the entire machinery, land and building are mortgaged. In view of the same, this Court admitted the matter and also passed the order of advertisement. The petitioner has filed an affidavit on 9th December,1999 pointing out that pursuant to the order, advertisement was published on 24th June,1999 in the Government Gazette. Further affidavit was also filed showing that the advertisement published in the Indian Express and also in the Sandesh daily news papers on 21st December, 1999.

3. It may also be stated that in support of company petition, an affidavit of Mr. M.A.Patel, Secretary of M/s. Vadilal Chemicals Ltd. is also filed which is at page-71 of the record and another affidavit of Mr. Lalit Chadha, proprietor of M/s. Goodwill Chemicals Industries is also filed which is at page-110 of the petition.

4. Learned advocate Mr. Saurin Mehta for petitioner at the time of hearing also pointed out that the company has also filed Special Civil Application No. 11176 of 1998 before this court against the order dtd. 24th August, 1998, when consent has been rejected by the authority under the Pollution Control Board with a

request that the company may again restart its unit, the Division Bench of this Court (Coram :R.Balia, A.R.Dave,JJ) vide its order dtd 17th August,1999 rejected the said Special Civil Application. However, the Division Bench has observed that it shall not come in the way of making appropriate application for seeking consent of GPCB of fulfillment of conditions afresh. However, till today nothing has been produced to show that the company has filed any fresh application before the Gujarat Pollution Board for restarting of the unit. It appears that the company has still not started manufacturing.

5. This Court (Coram : M.S.Parikh,J) passed the order dtd. 24th July,1999, which reads as under :

> "Since Mr. Akshay Mehta learned advocate for the respondent company submits before this Court that he could gather any information as stated in order dtd. 21.12.1999 except that the petition is filed before this Court. The matter will now proceed for issuance of the advertisement as directed in Para.3 of the order dtd.21.12.1998 (Coram : H.L.Gokhale,J). 5.8.99 shall be the date for final hearing. Time for publishing advertisement will accordingly stand extended:

5.1 It also appears that the company has filed O.J.Appeal dtd 12 of 2000 against the order passed by this Court on 21st December,1998, 24th June, 1999 and 11th July,1999. It appears that the said O.J.Appeal for condonation of delay of 224 days for which Civil Application No. 19 of 2000 be pleased to place for hearing. This Court (Coram : A.R.Dave & M.S.Shah,JJ) by an order dated 20th April, 2000 pleased to dismiss the condonation of delay and dismiss the O.J.Appeal No. 13 of 2000. Learned counsel Mr. Saurin Mehta produced this order for me at the time of hearing of this petition.

6. The learned counsel for the petitioner submits that in view of Section 433 of the Companies Act, particularly Clause -C as well as Cluase-E, the company should be ordered to be wound up. He further submits that as per the order of this Court (Coram :H.L.Gokhale,J) this company is not functioning since Octoberm1996 in view of the order passed by the Pollution Control Board and even, offer made by them before this Court, they have no succeeded. This shows that company is not able to carry on its business since October 1996. According to learned counsel only defence raised by the respondent company, the reply to the notice as well as reply before the Hon'ble Court that they have to supply

certain other goods and not making payment, except that defence, nothing has been stated. However, according to learned counsel for the petitioner they have categorically stated that company has placed an order for supply of certain goods on 7th March, 1997 to the petitioner and in response to the order, the petitioner supplied material at about 13th March,1996 for Rs.4,21,000/- (Rupees Four lacs and Twenty One thousand only). The relevant documents were prepared and the same were accepted by the company. The goods is not against the payment of Hundies and Hundies were discounted by the petitioner on 13th July,1996 against the bill of Rs. 4,21,000/- (Rupees Four lacs and Twenty One thousand only) which were due on 12th May,1996. Thereafter, the petitioner addressed a letter on 5.6.1996 to the company on the said subject. Thereafter, the petitioner has written several letters to the companies and in fact, the company has made the payment of Rs. 50,000/- (Rupees Fifty thousand) on or before 22nd July,1996 and made promise that the company should release the payment through Hundi. It was also submitted that the company failed to retire Hundi on due date and the petitioner had to pay Rs. 25,747/- (Rupees Twenty Five thousand Seven hundred and Forty Seven only) through bankers. Thereafter, the petitioner has also addressed a letter dtd. 13th December,1996 to the company demanding payment of the goods. Thereafter, the statutory notice was issued on 12th May, 1997 to the company for demanding the payment of Rs. 5,26,207/(Rupees Five lacs Twenty Six thousand Two hundred and Seven only). The said notice was replied on 5th July, 1997 only for the first time defence was raised that some chemicals is to be supplied against the payment. According to the learned counsel for the petitioner that during the entire period of correspondence, it has been stated by the company that against the payment, they have to supply certain goods. According to the learned counsel for the petitioner the defence raised by the company is not bonafide. This defence only raised with a view to see that the company may not have to make payment in this behalf. He has also relied upon the judgment of this Court (Coram: M.S. Shah, J) in the case of FICOM ORGANICS LIMITED VS. LAFFANS PETROCHEMICALS LIMITED reported in (2000) 99 Company Cases 471 where after considering at page 480 what consequences should follow if the Company's defence is found to be not bona fide, at page 484 the court observed thus:-

"It is thus clear that there is nothing in principle or precedent which would prevent the court from admitting the winding up petition for

> enforcing payment of a just debt. Merely because the winding up order is not a normal alternative in the case of a company to the ordinary procedure for realisation of debts, it does not dilute the power of the court to admit a winding up petition where the facts and circumstances of the case show that it would be a form of equitable execution. In such cases, the court would, therefore, ordinarily admit the petition after the company fails to avail of the opportunity given to it to pay up the debt in respect of which the company court had already given a finding that the dispute raised by the company was not bona fide, or the court may even conditionally admit the petition while granting the company opportunity to pay the debt to the petitioner. It would, however, be for the court to consider while exercising its judicial discretion as to whether in the facts and circumstances of a given case, the court would simply grant time to the company to pay the amount to the petitioner or whether the court should conditionally admit the petition and defer the order for advertisement or whether the court should admit the petition, because even though the defence may not be substantial the debt is also not found to be a just one."

Relying upon the said observation, learned counsel petitioner states that the defence raised by the company is not bonafide.

7. In view of the facts and circumstances of the case, respondent has also invited my attention to the affidavit in reply filed by the respondent. The contract was entered into with the clear understanding by both the parties that the Hundi was not required to be rejected and no payment in terms of money was required to be made to the petitioner. In fact, the PCONA which the respondent company was to supply to the petitioner was of the value of Rs. 14,00,000/- (Rupees Fourteen lacs only) at the rate of 84/- per Kg. It was therefore clear that had this transaction be materialized, the respondent company would have been naturally not indebted to the petitioner company, but the petitioner company would have been required to pay to the respondent company the balance amount after adjusting the purchase price of DNB. In short, the present transaction was in the nature of a contract of supply against supply for which the respondent was not to pay any monetary amount to the petitioner. It was stated that the respondent company

paid Rs. 50,000/- (Rupees Fifty thousand only) only because the company projected that it was facing financial indigency and that respondent company should remit some amount. In fact, it was admitted by the respondent company that material which has to be supplied would not be supplied to the other party which placed the order also and which was in great urgency to have material. It was further stated that immediately respondent informs the petitioner that it would be in a position to supply the PCONA of quality and quantity demanded by the petitioner within short time. The respondent company also submitted that there was an order passed by the authorities and environment department and that the Gujarat Electricity Board was also directed to disconnect the supply of electricity to the respondent company. So the manufacturing activity of the respondent company came to be suspended and natural consequence thereof its financial position became unstable.

8. In my view, therefore, taking into consideration the overall situation of the matter, the company is unable to pay debts. The defence raised by the Company is not bona fide and even other facts i.e. regarding not obtaining certificate from Pollution Control Board also establish that the company could not carry on business and the company has not produced the relevant records before the Registrar of Companies. On all these grounds, in my view, the Company should be ordered to be wound up both under Section 433(c) & (e) read with Section 434 of the Companies Act.

(K.M.Mehta,J)

(Vipul)